United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 15, 2004

S.A.M.
TO : Marta Figueroa, Regional Director
Region 24

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Triangle Construction and Maintenance, Inc.
Case 24-CA-9921

512-5090-2500
512-5090-2500
530-6050-0120
530-6050-4100
530-6050-7100
530-6067-2050-3500

This case was submitted for advice as to whether the Employer may unilaterally implement an individual arbitration procedure whereby current bargaining unit employees receive a cash incentive to waive their right to bring statutory employment-related discrimination and personal injury claims in a judicial forum. We conclude that because the scope of the "Dispute Resolution Agreement" signed by the employees is narrow enough, and the scope of the grievance/arbitration provision in the collective bargaining agreement broad enough, that the possibility of the DRA intertwining with the mandatory subjects of dispute resolution or elimination of discrimination is eliminated or minimal. Thus, the DRA is not a mandatory subject of bargaining and the Employer was free to unilaterally implement it even for current unit employees.

FACTS

Triangle Construction and Maintenance, Inc. (the Employer) is a construction and maintenance contractor to the HOVENSA oil refinery in St. Croix, U.S.V.I. On November 2, 2001 Our Virgin Islands Labor Union (the Union) was certified as the collective-bargaining representative for a construction and maintenance unit for the Employer and the parties reached a collective-bargaining agreement effective from March 18, 2002 to March 17, 2005.

During a committee meeting in June 2004,[1] the Employer informed the Union that HOVENSA was requiring that the Employer, as a subcontractor, enter into a Dispute Resolution Agreement(DRA) with its employees. The Union objected to the DRA, stating that the collective-bargaining

[1] All dates are 2004 unless otherwise noted.

agreement provided a grievance arbitration procedure, but offered to bargain about the DRA. The Employer told the Union that the DRA was not negotiable and that it had been distributed to the foremen to distribute to unit employees.[2]

On June 25, the Employer faxed the Union a letter regarding the implementation of the DRA. The letter stated that "for those issues not covered by the CBA, Triangle will initiate its DRA Program. In order to familiarize you with the rules and procedures pertinent to this Agreement, group sessions will be set up."

The Employer included a copy of the DRA which was entitled "Cash Incentive Program For Bargaining Unit Members." The DRA provides for the waiver of the employees' right to sue in a judicial forum regarding statutory claims for discrimination and personal injury or property damage claims arising from their presence at the HOVENSA worksite. The DRA states that a one-time cash incentive of $1,000 would be given upon receipt of a signed agreement. The agreement also states that the collective-bargaining agreement governed the employees' terms and conditions of employment and that nothing in the agreement was intended to interfere with or alter the relationship between the employees and the Union.

The DRA also states that it is not to be construed by employees as to permit them to arbitrate under the DRA any claims which involve the interpretation or application of the collective-bargaining agreement or that the DRA would prohibit the Union from proceeding with any grievance under the collective-bargaining agreement.[3]

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[2] In 2003, the Region submitted to Advice the issue of whether the DRA was a mandatory subject of bargaining in Case 24-CA-9477, when the Employer required applicants to sign the DRA before being considered for employment. On June 11, 2003, Advice determined that the Employer was free to unilaterally implement the DRA for applicants in view of their non-employee status and because such an agreement did not "vitally affect" the interests of unit employees. The Advice Memorandum specifically did not decide the issues of whether the DRA would be a mandatory subject if offered to current employees, or whether the policy would become a mandatory subject after an applicant became an employee.

[3] The collective-bargaining agreement grievance/arbitration provision states that " A grievance is defined as any complaint, difference, dispute, or request which involves the interpretation or application of, or compliance with, the provisions of this Agreement or any other employment related matter claimed by the employee or Union. Any

On July 8, the Employer held a meeting with employees and the Union to explain why the DRA was being offered to the unit employees and its ramifications and consequences. Copies of the DRA were distributed to all employees at the meeting and the employees were told that the offer to accept the cash incentive for signing the DRA was available until August 2. As of August 13, 217 of the 239 employees had signed the agreement.[4]

On July 23, the Union filed the charge in the instant case alleging that the Employer was direct dealing with employees by unilaterally implementing the DRA in violation of the parties' collective-bargaining agreement.[5]

ACTION

We conclude that the Employer did not violate the Act when it unilaterally implemented its arbitration procedure because the scope of the "Dispute Resolution Agreement" signed by the employees is narrow enough and the scope of the grievance/arbitration provision in the collective bargaining agreement broad enough that the possibility of the DRA intertwining with the mandatory subjects of dispute resolution or elimination of discrimination is eliminated or minimal. Thus, the DRA is not a mandatory subject of bargaining and the Employer was free to unilaterally implement it even for current unit employees.

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dispute over whether a difference or complaint is subject to the grievance procedure shall be processed as a grievance."

[4] At least one employee complained to the Union that he felt that his job was threatened if he did not sign the DRA. The Union advised him to sign the agreement under protest. The Employer refused to accept the DRA and did not pay the employee the incentive.

[5] The collective-bargaining agreement states that: " The Company shall not enter into any separate agreement with any employee in the bargaining unit or with any other labor organization with respect to any terms and conditions of employment."

I. Waivers of Right to Sue under Board Law

The Board has considered whether individual contracts, in the form of releases used to waive employees' rights to sue, are mandatory subjects of bargaining. In Borden, Inc.,[6] the Board held that whether such a release was a mandatory subject of bargaining depended on whether the release, a permissive subject of bargaining in isolation, exhibited interdependence with mandatory subjects of bargaining. In that case, the employer insisted on a general release of all future claims by employees during bargaining over severance pay during shut down negotiations. The Board concluded that there was not a sufficient nexus or interdependence between severance pay and the general release, given that the release was not part of the employer's initial severance pay proposal and that it was not added as a quid pro quo for any union concession. Thus, the non-mandatory release and the mandatory subject of severance pay were not "inextricably intertwined," and therefore the release was not a mandatory subject of bargaining.

In a more recent case, Regal Cinemas, Inc.,[7] the Board found that a release linked to claims arising out of permanent layoffs was proposed as a quid pro quo for severance pay, and was therefore so intertwined with the mandatory subject of severance pay that the release became a mandatory subject. The Board distinguished the general release of all claims in Borden, concluding that "in this situation, bargaining over such a specific release and bargaining over severance go hand in hand."[8] The termination and its effects was the focus of the bargaining; "[t]hus, severance pay and claims arising from the termination (such as discriminatory discharge claims) are properly viewed as reciprocal effects: benefits to employees, costs to the employer."[9]

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[6] 279 NLRB 396 (1986).

[7] 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003).

[8] Id. at 305. See general also, Sea Bay Manor Home for Adults, 253 NLRB 739 (1980), enfd. 685 F.2d 425 (2d Cir. 1982)(table) where the Board found that interest arbitration rose to the level of a mandatory subject where it had an immediate and significant effect on unit employees since it was so intertwined with mandatory subjects of bargaining.

[9] Id.

Thus, in Regal Cinemas the Board found that the severance pay and release were "inextricably intertwine[d]" so as to make the release a mandatory subject of bargaining. The Board has also indicated that it is the nature of the right extinguished by a waiver that determines whether to treat the waiver as a mandatory subject of bargaining.[10]

II. Mandatory Subjects which are implicated by Individual Arbitration Agreements

The D. C. Circuit Court of Appeals in Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.[11] concluded that the statutory right of access to courts is not a mandatory subject of bargaining in itself under the RLA. While we agree with that basic proposition, under the Board law discussed above regarding releases, it is clear that nonmandatory subjects can become so intertwined with mandatory subjects as to make them mandatory subjects. In construing the broad reach of the statutory language of Section 8(d) under the NLRA, the Board and courts have defined mandatory subjects as those that will "settle an aspect of the working relationship between the employer and the employee."[13] Not only must the issue address the relationship, but it must also "bear a 'direct, significant relationship to...conditions of employment,'"[14] or "vitally affect"[15] the employees' terms and condition of employment. As can be seen in Regal Cinemas, above, even an otherwise

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[10] Borden, Inc., 279 NLRB at 400, n. 5 (finding that a waiver of a future right to sue based on an already completed period of employment is so attenuated as to not be a mandatory subject).

[11] 199 F.3d 477(1999), judgment vacated and reinstated en banc, 211 F.3d 1312 (D.C. Cir. 2000) (per curiam), cert. denied, 121 S.Ct. 565 (2000)(hereafter "ALPA").

[12] 199 F.3d 477 (1999), judgment vacated and reinstated en banc 211 F.3d 1312 (D.C. Cir. 2000)(per curiam), cert. denied 121 S.Ct. 565 (2000)(hereafter "ALPA").

[13] See Mental Health Services, 300 NLRB 926, 927 (1990), citing Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

[14] Id. citing NLRB v. Salvation Army Day Care Center, 763 F.2d 1, 7 (1st Cir. 1985), quoting NLRB v. Massachusetts Nurses Assn., 557 F.2d 894, 898 (1st Cir. 1977).

[15] Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 178-180.

non-mandatory release can become mandatory if it is sufficiently intertwined with mandatory subjects.

Thus, the Board has long held that a mechanism for resolving disputes in the workplace is a mandatory subject of bargaining. In U. S. Gypsum Co.,[16] the Board affirmed the ALJ's holding that arbitration is a mandatory subject of bargaining. The ALJ reasoned that since an employer must bargain about grievances with the union, it must also bargain about the method of resolving grievances, and that arbitration is one of those methods. The ALJ considered that arbitration of workplace disputes would have the same type of effect on "rates of pay, wages, hours of employment or other conditions of employment" as seniority and union security.

Similarly, the elimination of discrimination from the workplace has been recognized as a "matter of highest priority" embodied in our national labor policy.[17] For this reason, the Board has held that discrimination in the workplace is a mandatory subject of bargaining.[18] The Board further held that unions as the collective-bargaining representatives of employees have a legitimate and important interest in a workplace free of discrimination.[19] These conclusions are driven, in part, by the Board's view that the elimination of discriminatory employment practices affects the entire bargaining unit, and not just the individual employee involved.[20]

III. The instant case under current Board law

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[16] 94 NLRB 112, 129 (1951). See also Indiana v. Michigan, 284 NLRB 53, 58 (1987)(affirming that arbitration is a mandatory subject of bargaining).

[17] Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 66 (1975), citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)

[18] See Jubilee Mfg. Co., 202 NLRB 272, 273 (1973), enfd. 504 F.2d 271 (D.C. Cir. 1974)(table)(employer must bargain over elimination of existing or alleged racial discrimination)(citations omitted). See also Emporium Capwell, 420 U.S. at 69 (elimination of discrimination and its vestiges is an appropriate subject of bargaining).

[19] Westinghouse Electric Corp., 239 NLRB 106 (1978) enf'd as modified sub nom. Electrical Workers IUE, 648 F2d 18 (D.C. Cir. 1980).

[20] Jubilee Mfg. Co., 202 NLRB at 273.

As stated above, a mandatory subject and non-mandatory subject can become so intertwined that there is an obligation to bargain over the ostensibly non-mandatory subject.[21] As to the mandatory subject of dispute resolution in the instant case, however, the scope of the DRA here is narrow enough, and the scope of the grievance/arbitration provision in the collective bargaining agreement broad enough, that the possibility of the DRA intertwining with the mandatory subjects of dispute resolution or elimination of discrimination is eliminated or minimal. Here, the language in the collective bargaining agreement's grievance/arbitration clause is broad enough that it would allow the Union to perform its exclusive 9(a) representative functions for the employees who voluntarily accept the terms of the DRA. The contractual grievance provision not only covers all the terms of the collective-bargaining agreement, but specifically states that the provision also covers any other employment matter claimed by an employee or the Union. Thus, the language in the grievance/arbitration provision is broad enough to cover all issues of discrimination and other matters involving employees' terms and conditions of employment, and such issues are specifically excluded from the DRA.

Furthermore, the DRA here is narrowly tailored to address a limited area of claims. The DRA here is restricted and is limited to addressing only: (1) statutory claims for discrimination or harassment under state, federal and territorial law that are not pursued exclusively through the grievance/arbitration in the collective-bargaining agreement; and (2) any claims for personal injury or property damage arising in any way from an employee's presence at the HOVENSA facility. The DRA specifically states that it is not intended to interfere with or alter any relationship between the employee and the Union. The agreement also states that it should not be construed as permitting an employee the right to arbitrate under the agreement any claims involving any complaint, difference, dispute or request which involves the interpretation or application of or compliance with the provisions of the collective-bargaining agreement. Nor does it prohibit the Union from proceeding with any grievance. Thus, such narrow language eliminates the concerns about the DRA applying to a wide variety of employee claims during a contract hiatus period, or serving as the dispute resolution process regarding non-contractual terms and conditions of employment. Therefore, there is not a sufficient nexus or

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[21] Regal Cinemas, Inc., 334 NLRB at 305.

interdependence between the non-mandatory waiving of the employees' ability to sue when using the DRA and the mandatory subject of resolving disputes in the workplace. Thus, the DRA is not a mandatory subject of bargaining and the Employer was free to unilaterally implement it even for current unit employees.

Finally, the DRA explicitly excludes filing charges with the Board, the EEOC, or other governmental administrative agencies. Thus, there is no Section 8(a)(1) violation in the DRA here.[22] Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

[22] Compare National Licorice Co. v. NLRB, 309 U.S. 350 (1940); Great lakes Chemical Corp., 298 NLRB 615, 622 (1990).